No. 11,420

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHILIP B. FLEMING, Temporary Controls Administrator,

Appellant,

vs.

DOROTHY HANSCOM and R. C. HANSCOM, d/b/a Dorothy Hanscom's, a Copartnership,

Appellees.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

Appellees apparently concede the force of the cases cited by us, but seek to avoid their effect by referring to the mimeographed notices as "orders" instead of interpretations of the regulations. Appellees' contention that the mimeographed notices were orders is purely an assumption unsupported by any authority and negatived by the very wording of the mimeographed notices.

All that these notices did was to inform dealers that Revised Maximum Price Regulation No. 330 had been

issued and was in effect. It then advised these dealers what the Regulation prescribed with regard to the preparation and filing of a pricing chart. The opening language of the second paragraph is most significant: "According to this revised Regulation, it is necessary * * *." Finally, in the last paragraph, the dealers were advised that a copy of the revised Regulation would be sent to them by the local OPA board as soon as they received their supply.

Clearly, these notices cannot be construed as anything more than notification that a new Regulation has been issued and had been put into effect, and a further notification of one of the provisions of that Regulation. As such, the most that can be said of these notices is that they constituted an interpretation of what the Regulation provided with regard to the filing of pricing charts. Since these notices did not constitute official interpretations under the provisions of Sections 54 and 55 of Revised Procedural Regulations No. 1, appellees had no right to rely upon them. The authorities which we cited in our original brief are admittedly in point as to this proposition.[1]

This brings us to the second or corollary contention of appellees, namely, that the Administrator was estopped from maintaining this action by reason of the notices.

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[1]In the *Griffin* case, the authority of the Rent Director as above disclosed, did not appear in the record. The Court, however, pointed out that both parties had conceded the authority of the Rent Director to issue the orders, and both parties relied upon the orders issued by the Rent Director.

It is a fundamental principle of our jurisprudence that the United States is neither bound nor estopped by the unauthorized acts of its officers or agents. This rule is so well settled as not to require the citation of the numerous cases in which it has been applied.

Typical of these cases is *United States v. Stewart,* 311 U.S. 60, where it was claimed that the defendant had relied on statements issued in circulars prepared and distributed by the Farm Loan Board. The Court said at page 70:

> "An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right. *Utah v. United States,* 284 U.S. 534, 545, 546, 52 S. Ct. 232, 235, 76 L. Ed. 469; *Wilber National Bank v. United States,* 294 U.S. 120, 123, 124, 55 S. Ct. 362, 363, 364, 79 L. Ed. 798."

Since the notices, whether considered as orders or as interpretations, were unauthorized,[2] no estoppel could result.

The cases cited by appellees on this proposition are not in point. In *United States v. Denver & R. G. W. R. Co.,* 16 F. 2d 374, the approval relied upon was given by the Secretary of Interior, and there was no claim made as to any lack of his authority to give

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[2]By Amendment No. 7, effective June 15, 1946, District Offices were authorized to issue orders governing the pricing by retailers of price-maintained merchandise. That provision is inapplicable here, and became effective long after the period involved in this case.

such approval. In *Fritch v. United States,* 234 Fed. 608, also relied upon by appellees, the Court, in its opinion on rehearing (236 Fed. 133) recognized the rule that the government is not estopped by the unauthorized acts of its agents or officers, but pointed out that the Secretary of Commerce and Labor was acting within the scope of his authority. Clearly, these cases have no bearing on the case at bar.

There is another cogent reason why appellees cannot claim estoppel. An essential element of the right to claim estoppel is that "the party asserting estoppel must be able to show that he has been injured by the conduct of the other party and that he had no knowledge or means of knowledge of the truth". (*In re Euclid Doan Co.* (C.C.A. 6th), 104 F. 2d 714, 715, certiorari denied 308 U.S. 619.)[3]

The rule has been succinctly stated in *Texas Co. v. Chicago & A. R. Co.* (C.C.A. 7th), 126 F. 2d 83, where the Court speaking of estoppel said at page 91:

> "It was never intended to work a positive gain to a party. See Notes, 17 Am. St. Rep. 24; 25 Am. St. Rep. 330. Its whole office is to protect him from a loss, which but for the estoppel, he could not escape. In other words, an estoppel should be limited to what may be necessary to

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[3]Obviously, appellees had no right to rely on the notices when they could and should have looked to the Regulation to which their attention was called by the notices.

In any event, the notices, at most, were not expressions of fact, but of law. Such expressions do not make the law other than it is, or estop the appellant from relying on the law as it really is. *Aunt Jemima Mills Co. v. Rigney & Co.* (C.C.A. 2d) 247 Fed. 407, 409, certiorari denied 245 U.S. 672; *Sturm v. Boker,* 150 U.S. 312.

> put the parties in the same relative position which they would have occupied if the predicate of the estoppel had never existed. *Phillipsburgh Bank v. Fulmer,* 31 N.J.L. 52, 86 Am. Dec. 193."

Appellees have failed to show how they will be adversely affected if their claim of estoppel is disallowed. It must be remembered that all the Administrator seeks to recover by this action is the amount of the overcharges which appellees have received. No damages above that amount are sought. (R. 15.) If the Administrator is permitted to recover, the appellees will be in precisely the same situation that they would have been in if they had followed the Regulation instead of the notices.

Let us re-create the situation as it existed when Revised Maximum Price Regulation No. 330 was issued. Suppose the District Office had not sent out the mimeographed notices. The appellees would have been required to read the Revised Regulations and file a new pricing chart based upon deliveries of garments during the first four months following the first delivery of garments by them. This would be the pricing chart which they eventually did file as the amended pricing chart on November 26, 1945. (R. 9-10.) Had appellees done so and abided by that pricing chart, their customers would have paid appellees $714.01 less than they did. Consequently, if appellees are compelled to pay to the Treasury of the United States the sum of $714.01, it puts them in the same position that they would have been in had they followed the Regulation and had not been "misled" by the mimeo-

graphed notices. Conversely, if the appellees' claim of estoppel be sustained, the result would be a positive gain to the appellees, contrary to the purpose and function of the principle of estoppel.

In a futile attempt to show that they have been injured, appellees argue that the Revised Regulation is arbitrary and discriminatory because it compels them to sell at the same prices which they charged during the first four months of their operations—a period in which they sold at less than their allowable maximum prices. This contention does not aid the appellees. It does not show an injury resulting from appellees' following the notices. Rather, it is a result which follows from the Revised Regulation itself. Appellees' complaint then goes, not to the alleged estoppel, but to the validity of the Regulation itself—a complaint which, in view of the provisions of Section 204(d) of the Emergency Price Control Act, as amended (50 U.S.C. App. Sec. 924(d)), cannot be made in this Court. *Yakus v. United States,* 321 U.S. 414; *Rosensweig v. United States* (C.C.A. 9th), 144 F. 2d 30.

CONCLUSION.

Appellant respectfully submits that the contentions advanced by appellees in support of the judgment are without merit. The judgment below is clearly erroneous and should be reversed and the case remanded with directions to the lower Court to enter judgment

in favor of the plaintiff in the sum of $714.01 and costs.

Dated, January 15, 1947.

Respectfully submitted,

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